United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-2067

To be argued by
STEPHEN M. BEHAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/fs

Docket No. 75-2067

HAROLD SHATZ,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT-APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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Preliminary Statement

(1)

On March 28, 1972 a Grand Jury for the Eastern District of New York returned a two count indictment charging Edward Brugman, Efrain Rodriguez, John Arroyo and the appellant, Harold Shatz, with twice conspiring to obstruct commerce by extorting money from banks with the consent of bank employees, obtaining said consent through the use of threats of violence, in violation of Title 18 United States Code, Section 1951.

On July 31, 1972, Efrain Rodriguez pled guilty to the first count of the indictment and Edward Brugman pled guilty to a superseding information charging him with conspiring to enter a bank with intent to commit a felony therein, in violation of Title 18 United States Code, Section 371.

The trial of John Arroyo and appellant on the original indictment commenced on October 13, 1972 before the Honorable Jack B. Weinstein, United States District Judge. On October 16, 1972 a mistrial was granted as to Arroyo, and on October 18, 1972 while the jury was deliberating in appellant's case, Arroyo pled guilty to a superseding information charging him with conspiring to enter a bank with intent to commit a felony therein, in violation of Title 18, United States Code, Section 371. Later that day, the jury found appellant guilty of both counts. Appellant was then sentenced to ten years imprisonment on each of the counts, the sentences to run concurrently.

Shatz filed an immediate notice of appeal and on September 5, 1973 this Court affirmed his conviction without opinion. Appellant's subsequent petition for a writ of certiorari was denied by the Supreme Court on February 19, 1974. See, *United States* v. *Shatz*, 415 U.S. 922 (1974).

On September 9, 1974 appellant filed the instant motion pursuant to Title 28, United States Code, Section 2255 to vacate his sentence. On September 24, 1974 Judge Weinstein denied the petition in all regards except for appellant's claim that he had been sentenced without benefit of a presentence report. Appellant filed additional papers addressed to his motion on October 7, 1974. The Court then appointed counsel for appellant, following the filing of further papers by appellant and his counsel, the Court held a hearing on the motion on March 24, 1975.

Appellant called only one witness (Edward Brugman) at the hearing. Following that testimony the Court denied appellant's petition in all respects with the exception of his motion for resentencing in view of the fact that the Court now possessed a proper pre-sentence report. The Court then reimposed the original sentence.

(2)

Harold Shatz now appeals from the March 24, 1975 denial of his motion to set aside his conviction. In his motion and on this appeal appellant now contends that the Government's chief trial witness, Edward Brugman, had been instructed by the Assistant United States Attorney to commit perjury. The alleged trial perjury consisted of the witness' denial that the Government had promised him that the sentence he would receive in Federal Court would be concurrent to a state sentence he was then serving.

The Government here urges affirmance of the District Court's dismissal of the petition on the grounds that the District Court properly found that there was no basis in fact for appellant's contention that such a promise was made and, alternatively, that the District Court was also correct in finding that even if such a promise were made, its revelation could not have affected the jury verdict.

Statement of Facts

The Honorable Jack B. Weinstein presided at the pleas, at trial, at sentencing and on the instant motion. At the trial of appellant, Edward Brugman was the Government's chief witness. His testimony squarely placed Shatz at the helm of the conspiracy. Following Brugman, the Government's other witnesses corroborated his testimony.

The Trial

The crux of the Government's case against Shatz lay in Brugman's testimony. Defense counsel, in a cross-examination which lasted the better part of an afternoon and the following morning, vigorously attacked Brugman's credibility, and indeed, the revelations were devastating.

On direct examination, prior to his substantive testimony, Brugman admitted that he had pled guilty to the superseding information and was then awaiting sentence by Judge Weinstein (Tr. 32-33).* He admitted prior convictions for "grand larceny, burglary, possession of a hypodermic needle, armed robbery, possession of stolen goods" all of which had resulted in his having spent seven of his twenty-five years in prison (Tr. 32).

Brugman further admitted that he had a long drug addiction history, stretching from the time he was 13 years old until his arrest in the instant case (Tr. 33). He confirmed that he had committed four armed robberies in Nassau County, with Shatz, for which he was now serving a five year sentence (Tr. 63). Brugman then admitted that he had been on drugs at the time that he had attempted to rob and murder two drug pushers and that in the course of committing this last crime he had been shot by the pushers and fled to Puerto Rico to avoid being killed (Tr. 68).

During the course of his substantive testimony, Brugman testified that Shatz had recruited Rodriguez, Arroya and himself to commit a series of robberies. Shatz had taught them to locate a potential victim's home from the license plate number of her car and by then impersonating a police officer when requesting identification information from the Department of Motor Vehicles and to then gain entrance to the victim's home by impersonating a postal employee (Tr. 35-41). After the success of these robberies (Tr. 57-58), Shatz decided this scheme could be adapted to obtain large sums from a bank. After selecting and identifying a bank manager, they would use the postal ruse to gain entry into his home, hold his wife or child and demand money in return for her safe release (Tr. 65-68).

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* Reference to the trial transcript in *United States* v. *Shatz*, 72 Cr. 465 will be indicated by "Tr.", followed by the page number.

At this point in the conspiracy Brugman fled to Puerto Rico. On his return, he learned from Shatz that an attempt had been made to use the bank extortion scheme (Tr. 72), with Arroyo filling in for Brugman and holding a bank manager's daughter as captive (Tr. 73). Shatz explained that his own role was to maintain surveillance of the bank manager, who disobeyed the extortionsts' instructions and thwarted the attempt (Tr. 72-73).*

Brugman, Shatz and Rodriguez then decided to make a second attempt. After their victim had been selected, and their plans detailed, but before the crime could be executed, Brugman was arrested (Tr. 73-81).**

On cross-examination, Brugman admitted that he had been an addict for twelve years (Tr. 88); that his habit cost eighty-five dollars a day (Tr. 89); that he associated with and "shot up" heroin with other addicts, including Rodriguez (Tr. 89); that he had been shot during his attempt to rob two narcotic pushers; that he fled the country because he believed the pushers had put out a "contract" on him (Tr. 93-95); and that he had used fifteen bags of heroin a day, often resulting in an overdose and/or loss of consciousness (Tr. 99-100).

Brugman also admitted that he had been treated and confined on various occasions, for psychiatric disorders, since he was twelve years old. His confinements were never voluntary; he had, in every instance, been committed by the State (Tr. 97-98).

Relating his criminal history, Brugman admitted that he had been in prison until October, 1970 (Tr. 89). He

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* This testimony was corroborated in exacting detail by the testimony of both the bank manager and his daughter (Tr. 198-206).

** Mr. Gelosky, the second bank manager, corroborated Brugman's testimony concerning this second attempt (Tr. 188-193).

confirmed that he had been sentenced to Ossining for committing three separate robberies (Tr. 96) in which he had used a loaded gun (Tr. 100). He admitted that he had pled guilty in Nassau County for these three robberies, receiving a five year sentence, even though he could have received up to seventy five years on the three counts (Tr. 175).*

Brugman further admitted pleading guilty to a federal superseding information arising from his role in the Shatz scheme (Tr. 104). Although he had not yet been sentenced, the maximum he could receive was five years imprisonment under the information. The original indictment had exposed him to a possible forty years imprisonment (Tr. 175).

Defense counsel repeatedly tried to determine if any promises were made by the federal prosecutor. Brugman denied any explicit promises but counsel twice insisted on implying that Brugman had been promised a concurrent sentence:

> Mr. Castellano: Were any promises made to you by the Federal Attorney's Office in consideration of your testifying here?
>
> Mr. Brugman: No.
>
> Mr. Castellano: You mean he didn't give you any assurance of any kind with reference to your sentence?
>
> Mr. Brugman: No, just a recommendation.
>
> Mr. Castellano: Oh.
>
> Mr. Brugman: He said he was going to recommend——
>
> Mr. Castellano: Make a recommendation on your behalf?

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* In response to questioning by defense counsel, Brugman denied receiving any assistance from the Assistant United States Attorney regarding his problems with the Nassau County District Attorney (Tr. 108).

Mr. Brugman: (No response).

Mr. Castellano: Is he?

Mr. Brugman: Yes.

Mr. Castellano: When is he going to make this recommendation?

Mr. Brugman: I don't know.

Mr. Castellano: What recommendation is he going to make?

Mr. Brugman: I am doing time now. The time I got here is five years.

Mr. Castellano: You are going to get here five years?

Mr. Brugman: That is the most I can get, five years.

Mr. Castellano: You pleaded guilty to a charge that the most time you can get on that charge under this indictment is five years?

Mr. Brugman: Five years. I would have gotten nothing if I went to trial.

Mr. Castellano: You mean you would have beaten it if you went to trial?

Mr. Brugman: Sure, after Rodriguez copped out.

Mr. Castellano: After Rodriguez copped out, you would have beaten this case, but instead you elected to plead guilty on the assurance that the Assistant is going to recommend five years for you, is that the situation?

Mr. Brugman: To tell you the truth——

Mr. Castellano: Yes, that would be interesting.

Mr. Brugman: Recommendation or no recommendation, I still was going to do what I am doing now. Whether ten or fifteen, whatever it was, I still was going to do what I am doing now.

Mr. Castellano: But that the recommendation that you have gotten the assurance from this gentleman is, he is going to recommend to the Court that you get five years on the plea that you made?

Mr. Brugman: No. I copped out to a plea of five years.

Mr. Castellano: You didn't plead to the indictment, you copped out to a lesser plea, so you can only get a maximum of five years, is that right?

Mr. Brugman: Yes.

Mr. Castellano: That was the offer that was made by the Federal Attorney's office through your attorney?

Mr. Brugman: Yes.

Mr. Castellano: What are you going to do about Nassau County, Mr. Brugman?

Mr. Brugman: I don't understand.

Mr. Castellano: There are three indictments out there, aren't they still there? You have to face trial there, don't you?

Mr. Brugman: No sir.

Mr. Castellano: You are through with them?

Mr. Brugman: Yes.

Mr. Castellano: Did the Federal Attorney contact the District Attorney's office in Nassau County and work something out for you?

Mr. Brugman: No.

Mr. Castellano: How did you get through with them?

Mr. Brugman: I have been through with it.

Mr. Castellano: You just pleaded guilty recently within the last several months?

Mr. Brugman: I pleaded guilty back in January or February. I don't remember. I got sentenced in April sometime.

Mr. Castellano: You got sentenced?

Mr. Brugman: In April.

Mr. Castellano: What sentence did you get on those three robberies?

Mr. Brugman: I got five years.

Mr. Castellano: For everything?

Mr. Brugman: Yes.

Mr. Castellano: In each one of those three robberies, you used a gun?

Mr. Brugman: Yes.

Mr. Castellano: Each one of those robberies, there was a person, a woman or children in a house?

Mr. Brugman: Yes.

Mr. Castellano: And there was three of them?

Mr. Brugman: Yes.

Mr. Castellano: And you confess to the three of them?

Mr. Brugman: Yes.

Mr. Castellano: And Nassau County is going to give you five years for the whole three?

Mr. Brugman: Yes.

Mr. Castellano: Is that going to run concurrent with this five that you got here?

Mr. Brugman: Nassau County?

Mr. Castellano: Yes.

Mr. Brugman: I already got the time in Nassau County.

Mr. Castellano: They told you what it was, it is going, the two five years, are going to run together, concurrently, so you only do one five for the both of them?

Mr. Brugman: What?

Mr. Castellano: The five you got from Nassau and the five you are going to get here, which is the most you can get under the plea that was given to you.

Mr. Brugman: Why not, why shouldn't I?

Mr. Castellano: I don't see why not. I was only surprised you didn't get a medal, too.

Mr. Brugman: If I can get it why not?

Mr. Castellano: That's right. You are getting five years for three armed robberies in Nassau County and confessing to this indictment that you are getting a total of five to encompass the whole four, and you are entitled to it, is that correct?

Mr. Behar: Objection. Defense counsel has just stated a question that has not come forth in Mr. Brugman's answers to prior question.

The Court: I will allow the question.

Mr. Castellano: Isn't that right?

Mr. Brugman: I lost the question. I forget what you said (Tr. 105-110).

On redirect, Assistant United States Attorney Behar asked Brugman specifically if he had been promised a concurrent sentence:

Mr. Behar: Were you ever told that your terms were going to run at the same time—they were going to be concurrent for this sentence and the one out in Nassau County?

Mr. Brugman: Concurrent?

Mr. Behar: Yes.

Mr. Brugman: No.

Mr. Behar: Did I ever tell it to you?

Mr. Brugman: No.

Mr. Behar: Did Mr. Chrein [Brugman's counsel] ever tell it to you?

Mr. Brugman: No. (Tr. 176).*

On re-cross, defense counsel again demanded to know if a deal had been made:

Mr. Castellano: So you say that out in Nassau County you got five years in satisfaction of three armed robberies and you are going to do five years when you could have done 75?

Mr. Brugman: Yes.

Mr. Castellano: And you got no help from the United States Attorney's Office?

Mr. Brugman: No, sir. (Tr. 179).

Despite Brugman's denials, defense counsel in summation suggested that Brugman's promise to testify at appellant's

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* Mr. Simon Chrein of the Legal Aid Society, Brugman's Court appointed counsel, remained at Brugman's side throughout his testimony (Tr. 82, 171).

trial was a condition precedent to his receiving a five year sentence in Nassau County (Tr. 215-16).

The jury convicted Shatz on both counts on October 18, 1972 and Judge Weinstein immediately sentenced him to ten years on each count, to run concurrently.

Brugman's Sentencing

Brugman was sentenced on October 25, 1972 by Judge Weinstein. The Assistant United States Attorney's remarks at sentencing concerned only the importance of Brugman's testimony and pre-indictment cooperation and Brugman's representations to the Assistant that his criminal conduct was motivated by his desire to obtain narcotics (G. 15-16).* In response to a defense request, the court instructed Brugman that all it was empowered to do was recommend to the Attorney General that a state institution be designated for service of the federal sentence (with the effect of a concurrent sentence) but that the court could *not* do so itself nor could it guarantee that its recommendation would be accepted (G. 14-16). The sentence was to be a period of five years with a recommendation that a state institution be designated by the Attorney General, so that the Federal and state sentences could be served simultaneously (G. 18).

At sentencing, Brugman made no indication that he had been promised a concurrent sentence from *anyone*. He merely indicated that his drug problems drove him to his criminal conduct (G. 14).**

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* Page references bearing the prefix "G" are to pages in the Government's Appendix.

** Indeed, when Brugman entered his guilty plea the court asked if any threats or promises had been made to him. His response was, "No sir." (G. 5). Furthermore, the Court at the same proceeding stated that "Nobody has discussed this case with me" (G. 7).

Subsequent to his return to State custody, Brugman wrote Judge Weinstein on December 24, 1972, indicating his continued uncertainty as to whether his sentence had ultimately been concurrent or consecutive:

"Judge Weinstein,

Sir, I am writting to you concerning my federal sentence. I apeared befor you on 10/25/72 for sentencing, at that time I was serving a five year state sentence. My Attorney Mr. Barry Krinsky from the legal Aid Society ask you if the court will consider of running my sentence conc. with my state sentence. The Assistant United States Attorney, Mr. behart, I belive that is his name. also ask if the court would consider of running my sentence conc. with the state sentence. Sir, you told me that you was sorry but that you cannot run my sentence together with the state, that you did not have the power to do so, that the only one who have such power was The United States Attorney, but that you will write to him and recomend the my federal sentence be run conc. with my state sentence. Now sir, when I was in Sing-Sing I received a paper saying; that you Sir, sentence me to a period of five years but to run conc. with my state sentence. Now sir, I don't understand whats happening, I worte to the service unit over here and ask then to check it out for me, and they told me that it was true, that my federal sentence is running together with my state sentence. Now sir, I don't men to bug you, but I don't trust these people here or in anyother prison, but when you sentence me sir, you did not run my sentence conc. with the state, Now these people are telling me that my federal sentence is running together with my state sentence. Now, I know I'm doing five years for the state and when I finish here I know I have to do five years for the goveremen' Now sir, my problem is that I don't know if these people are kidding me or what, I don't

> think is very funny for these people to be playing with a man life, (don't you think so?) So sir, I like to hera it stright from the horse mouth, (I hop you don't mind my expression). Well sir, I hop you could help me with this problem and set me stright." (G. 19-20).

Thus, even at this point, after testifying and after being sentenced to what he still feared was a consecutive term, Brugman did not allege that the Assistant United States Attorney had promised that he would receive a concurrent sentence.

It was then discovered by Brugman's counsel, who forwarded the information to Brugman, that on November 14, 1972, the Attorney General decided to designate the state institution where Brugman was incarcerated as the place of confinement for his federal sentence (G. 23).* It was at this point, three months *after* trial that Brugman learned that his federal sentence would be concurrent to his state sentence.

Appellant's Motion

After Shatz' conviction was affirmed on direct appeal, and certiorari denied, he filed the present motion. Judge Weinstein ordered a hearing be held on March 24, 1975. Appellant's moving papers contained only vague allegations, most of which had already been dealt with on direct appeal.**

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* Krinsky's inquiry was in response to a request by Judge Weinstein to determine Brugman's status after the court received Brugman's own inquiry. Judge Weinstein's letter indicates he did not then know whether the Attorney General had acted on the recommendation (G. 22).

** The specific allegation of a promised concurrent sentence arose first at this evidentiary hearing. None of the moving papers mentioned in particularity the charge that Brugman had been instructed by the Assistant United States Attorney to per-

[Footnote continued on following page]

At the outset of the hearing Judge Weinstein, recalling that he had been the trial judge for Shatz, and the sentencing judge for Brugman, remarked that the matter of Brugman's credibility had been fully explored and Brugman could not be impeached any more than he had been at trial (A. 29). Appellant's new counsel then stated that he had recently talked to Brugman and he was contending that the Assistant United States Attorney had promised Brugman a concurrent sentence and instructed him to deny the making of such a promise if so asked at trial (A. 30-31). Appellant then called Edward Brugman to the stand. Brugman's recollection of events was so obfuscated, that his testimony at the hearing must be set out in detail:

> Brugman: Well I was charged with two bank conspiracies and Mr. Behar told me that if I don't cooperate with him on the indictment he could give me twenty years. One carried twenty years and if I cooperate he help me out and I asked him if the court is going to promise me something and he said that the court don't promise, don't make no promises,

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jure himself. Shatz' *pro se* memorandum alleged, *inter alia*, and incidentally, that "the government failed to make a full disclosure to the Court or the jury the promises made to the witness in return for his testimony" (Appellant's Appendix at A-8). Counsel's supplemental memorandum, charging a "knowing and intentional use of perjured testimony by the government, . . . [alleged a failure] . . . to fully develope [sic] the extent of the crimes for the State of New York for which the government was instrumental in seeing that the witness only received a token sentence of 0-5 years for all of the state robberies he was charged with. Further, the government knowingly allowed the witness to take the Fifth through the advice of his appointed counsel to prevent him from delving into the extent of his state charges to which he was involved in at that time, and in this way was a party to suppression of evidence favorable to the defendant, with the full knowledge that the witness had been granted immunity from prosecution except to the extent of the token sentence of 5 years" (A-12). (Page references bearing the prefix "A" are to Appellant's Appendix.)

At no place in the motion papers is the concurrent sentence issue mentioned, the only issue before this Court on appeal.

that he takes care of it, he run it, but I understood that he will run my time together and I would get no more than five years and if I don't cooperate he will give me the twenty years, indictment for twenty years (A. 37) . . . [I]f they ask me about anything that there was a deal, a promise made, I say no, no promises was made and he [Behar] asked me, told me if Mr. Castellano, Mr. Shatz's lawyer, asked me if I was supposed to consent and what was my charge and convicted that I was going to get sentenced for, to tell him it was for conspiracy bank robbery maximum five years and I was going to get sentenced by Judge Weinstein and he told me to say this, right from or in front of the same judge, I was going to get sentenced (A. 40). . .

My understanding, the impression I got, the understanding I already have of five years from New York State and five years from Nassau County and if I cooperate with the government my understanding that they give me five years running together with New York and Nassau County (A. 41).

* * * * *

Mr. Gotlin [Appellant's counsel]: Who told you that it would run concurrently?

A. Mr. Behar. He didn't tell me, I don't remember the words. He told me, he said the court, Mr. Weinstein, he makes no promises, you know. And how about running my time together. I mentioned, with the other thing and he said don't worry about it, he would talk up for me that he would take care of it. It was true my time would run together and that is why I cooperated. This is the understanding I had.

Q. But when you were asked by Mr. Castellano at the trial whether any promises were made to you in consideration for your testifying at the trial

did Mr. Behar tell you how to answer that question? Did he tell you whether to answer yes or no?
A. He told me to answer no because the Court don't make no promises and he was speaking about my Judge Weinstein, Judge Weinstein, and he told me I said no.

Q. That was not your understanding?
A. No (A. 43).

On direct, Brugman further stated that he received consecutive sentences, that a month later he received notice that it had been made concurrent, and he then requested a clarification from Judge Weinstein (A. 47). At this point in the hearing, Judge Weinstein explained to Brugman that he, the court, had never been empowered to give Brugman a concurrent sentence but that the court had recommended it to the Attorney General, who followed the recommendation (A. 48).

On cross-examination, Brugman denied that his testimony at trial, which had been that he had not received a promise of concurrency, was true (A. 49). On redirect, appellant's counsel led Brugman into the following testimony:

Mr. Gotlin: Page 176. You read the question concerning whether your time was going to run concurrently and he asked you and I am quoting from page 176: "Were you ever told that your terms were going to run at the same time, they were going to be concurrent for this sentence and the one out in Nassau?"

And your eventual response was: "No."

Did Mr. Behar tell you to answer that question that way?

Mr. Brugman: Yes, he told me if they asked me if I make a deal with the court you know to say no because the court, the Federal Court, don't

make a deal like the New York State and Nassau County.

Mr. Gotlin: But he said he was going to take care of it for you, is that right?

Mr. Brugman: Yes (A. 53-54).

The Court then asked Brugman if his trial testimony was truthful in all other regards. Brugman replied affirmatively. Judge Weinstein then instructed appellant's counsel to call his next witness. When counsel informed the Court that he had no additional witnesses, the Court immediately began his ruling dismissing the petition. The Court found that Brugman was incorrect in his present belief that he had been promised a concurrent sentence:

The Court: The petition must be dismissed. The Court has examined this witness' case, the correspondence in 72-CR-919 referred to by Mr. Brugman including Mr. Brugman's letter of December 24, 1972, my response of January 3rd, 1973 and Mr. Chrein's letter at my request of January 10, 1973. The Court has examined the commitment order. The Court has also examined the pre-sentence report of Mr. Brugman and the recommendations of the other judges in this case . . . I believe the witness was mistaken in his testimony that he had been promised a concurrent sentence by the United States Attorney. His testimony on the point is ambiguous but construing it in the light most favorable to the plaintiff Shatz it is unbelievable.

The Assistant United States Attorney was fully aware of the fact he could not make such a promise and that in fact the court could only make a recommendation. Even if what the witness says is true, that is the Assistant United States Attorney made such a statement to him beyond a reasonable doubt this would not have affected the verdict. These

> matters were thoroughly investigated at the trial and the evidence against this plaintiff Shatz was overwhelming on the issue of credibility. There was ample evidence with respect to bias, bad prior record and desire to make a deal to avoid a long prison term and inconsistencies in the testimony of the witness.
>
> This fact if it had been elicited would have made no difference in the total evaluation of the evidence. Under the circumstances the motion must be denied (A. 54-56).

Before the Court could then move on to the question of appellant's recently prepared pre-sentence report, the Assistant United States Attorney, the same Assistant that tried the Shatz case, stated to the Court that Brugman was incorrect in his present testimony and that the Government had been prepared to call the two lawyers from the Legal Aid Society who had previously represented Brugman, to testify that the no such promise had been made (A. 56-57).

The Court then resentenced appellant after considering his pre-sentence report, again sentencing appellant to ten years imprisonment on each count, sentences to run concurrently and credited appellant for time already served.

ARGUMENT

POINT I

Judge Weinstein was correct in concluding that Brugman's hearing testimony was unbelievable.

Though appellant fails to mention it in his brief, the District Court made an initial finding of fact after appellant stated that Brugman was his only witness and before the Government even had an opportunity to produce witnesses of its own. The District Court's initial conclusion was:

> I believe the witness was mistaken in his testimony that he had been promised a concurrent sentence by the United States Attorney. His testimony on the point is ambiguous but construing it in the light most favorable to the plaintiff Shatz it is unbelievable. (A. 55).

As the District Court was correct in this determination the subsequent question of whether or not the District Court was in error in evaluating the potential effect of the revelation of the alleged promise upon the trial jury need never be reached. The District Court in fact found that no such promise of concurrent sentences had been made by the Government to Brugman. Appellant does not and obviously, cannot, challenge this finding. Given a finding that no such promise was made, it is unnecessary to speculate upon the effect of its revelation to a jury. Therefore, the primary issue on this appeal must be the correctness of the initial factual finding of the District Court.

The only evidence in support of his charge offered by appellant was the testimony of Edward Brugman. The District Court, however, found Brugman's testimony as to the alleged promise to be unbelievable. The District Court's finding can only be set aside if it is clearly erroneous. *Zovluck* v. *United States*, 448 F.2d 339 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

At the hearing appellant had the burden of proving his charges of perjury and subornation of perjury. *Zovluck, supra* at 341. In satisfaction of this burden he offered the confused, muddled and indecisive testimony of Edward Brugman.* Even on Brugman's direct examination at the hearing he was unsure. He testified as to his understand-

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* Curiously, appellant never raised this specific charge as to the promised sentence all through his direct appeal and his petition on this motion (Compare A. 4-25 with A. 29-30).

ings and impressions that he would be sentenced concurrently and he balanced it with his recollection that the Assistant United States Attorney kept cautioning him that the trial court would not make any promises. It is only when the government cross examined Brugman with his trial testimony that Brugman stated definitely that his testimony at trial was wrong. This was the only evidence with which appellant sought to fulfill his burdens.

Weighed against this indecisive evidence, Judge Weinstein observed a veritable avalanche of contrary evidence. Initially, Brugman's own testimony at appellant's trial; Brugman's statement on redirect examination that no such promise had been made. This statement was made by Brugman, in the presence of his own attorney, Mr. Chrein, elicited purposely by the Assistant United States Attorney after appellant's trial counsel had tried to imply to the jury that just such a promise had been made. It was obvious to the trial judge, who was the same judge who presided at the hearing, that if the Government at trial wanted to avoid a discussion of this issue it would not have asked this direct question.* Simply, the Government was trying to clearly complete the record as to any promises made to Brugman.**

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* In view of the extensive cross-examination of Brugman that had already occurred it would make little sense for the Government to try to falsely rehabilitate this witness by proving he was going to receive at most a ten year sentence, instead of a five year sentence, when his pleas had satisfied a possible exposure of one hundred and fifteen years of imprisonment. Judge Weinstein, of course, was additionally entitled to conclude that if the Government were going to participate in falsifying this witness' testimony it would have done so in a more material respect. This, at the very least, could also account for the Court's crediting the Government with being "fully aware of the fact that [it] could not make such a promise and that in fact the court could only make a recommendation" (A. 55).

** Of note also is the next question the Government asked Brugman at trial which was whether or not Brugman's lawyer ever told him about such a promise. This question was likewise answered with a strong, simple, straightforward, "No" (Tr. 176).

This testimony and these responses by Brugman were made at the time when he was most concerned with any promises the Government might offer. Brugman's trial testimony was contemporaneous to the alleged promises, not the results of a hazy recollection following two and one half years of further imprisonment.

Additionally, Judge Weinstein knew that Brugman had consistently denied this alleged promise in the past; first at Brugman's own pleading, then at appellant's trial, at Brugman's own sentencing; and even after sentencing when he inquired as to the nature of the sentence. If such a promise existed surely Brugman would have revealed it at those vital times in the history of his own prosecution.

Finally, Judge Weinstein with his own long experience of evaluating Brugman, was best able to determine when and how to credit Brugman's testimony. Judge Weinstein had witnessed Brugman's plea (when Brugman first denied the existence of any promises), his trial testimony, his sentence and had these to compare to his testimony at the hearing. This Court has long recognized the regard that should be placed upon a district court's evaluation of the credibility of the witnesses that appear at hearings such as these, *United States* v. *Wilkens*, 281 F.2d 707, 713 (2d Cir. 1960), especially when that same Court also presided at the original trial, *Zovluck, supra* 448 F.2d at 343. Under the circumstances of this case, Judge Weinstein's findings should remain undisturbed.

POINT II

Judge Weinstein was also correct in finding that the revelation of the alleged promise would not have affected the jury verdict.

If, solely for the purposes of argument, one were to concede that the promise of concurrent sentences were made to Brugman prior to appellant's trial, Judge Weinstein's finding that its revelation would not have affected the jury verdict was still correct. Appellant properly cites *Giglio* v. *United States,* 405 U.S. 150 (1971) as setting out the standard in this very situation. In *Giglio, supra,* at 154, the Supreme Court, citing *Napue* v. *Illinois,* 360 U.S. 264 (1958) held that, "a new trial is required if 'the false testimony could in any reasonable likelihood have affected the judgment of the jury . . .' ". There could be no likelihood, reasonable or otherwise, that the revelation of this alleged promise could have affected that judgment.

Brugman's cross-examination at trial was not only lengthy but, it was quite effective. Brugman was cross-examined as to his lifelong criminal history, inevitably leading up to the Federal charges he was then facing; his twelve year history of drug addiction; and his history of involuntary mental commitments. It is inconceivable that a witness' character could have been more tarnished in the jury's eye.

Brugman's cross-examination also covered the substantial consideration he was then receiving for testifying. Defense counsel hammered home the message that the witness was exchanging his testimony in order to avoid a possible one hundred and fifteen years of imprisonment. What better functional example of immateriality than to pick over whether Brugman faced five or ten years of imprisonment, when compared to the length of sentence he was avoiding. However, counsel was not satisfied with

this and persisted in attempting to imply to the jury that Brugman had made a deal for a maximum of five years or at the very least expected that he would receive no more. Whether Brugman by testifying had avoided twenty times his eventual sentence or had "merely" avoided ten times his eventual sentence could not have possiblye altered the jury's verdict.

Brugman's second motive for testifying was also obvious to the trial jury; as Judge Weinstein stated at the hearing Brugman's animosity for appellant was brought out at the trial (A. 38).*

Faced with all this material on Brugman's motives and background on his character, the jury still chose to believe at least a substantial portion of Brugman's testimony. The answer as to why the jury acted in this manner must lay in the testimony of the other trial witnesses who corroborated Brugman. The testimony of these witnesses when combined with the detail of Brugman's testimony caused the jury to vote for appellant's conviction. An insignificant plus or minus on the jury's already well studied view of Brugman's motives would not have made the slightest difference. See *United States* v. *Rosner*, — F.2d — (2d Cir. slip op. 3245; decided April 29, 1975).

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* The apparent cessation of that animosity, within the recent past, may hold the key as to why Brugman suddenly "understands" that he was made a previously denied promise.

CONCLUSION

The order of the District Court should be affirmed.

Dated: July 9, 1975

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Anne C. Flannery in the preparation of this brief. Ms. Flannery is a third year law student at Brooklyn Law School.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 11th day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Respondent-Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Daniel J. Gotlin, Esq.
401 Broadway
New York, N.Y. 10013

Evelyn Cohen

Sworn to before me this
11th day of July, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977